

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**SOUTH MOUNTAIN CREAMERY,  
LLC,**

**Plaintiff**

**v.**

**U.S. FOOD AND DRUG  
ADMINISTRATION, et al.,**

**Defendants**

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**No. 1:18-cv-00738**

**(Judge Kane)**

**ORDER**

**AND NOW**, on this 31st day of March 2019, upon consideration of Defendants the U.S. Food and Drug Administration (“FDA”) and Commissioner Scott Gottlieb, M.D. (“Commissioner Gottlieb”) (collectively referred to herein as the “Federal Defendants”)’ motion to dismiss Plaintiff South Mountain Creamery, LLC (“Plaintiff”)’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction (Doc. No. 24), and the Federal Defendants and Defendant Russell C. Redding (collectively referred to herein as “Defendants”)’ joint motion to stay discovery pending resolution of the Federal Defendants’ motion to dismiss (Doc. No. 29), and in accordance with the Memorandum entered concurrently with this Order, **IT IS ORDERED THAT:**

1. The Federal Defendants’ motion to dismiss (Docs. No. 24), is **DENIED WITHOUT PREJUDICE** to the filing of a subsequent motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction;<sup>1</sup>
2. Defendants’ motion to stay discovery pending resolution of the Federal Defendants’ motion to dismiss (Doc. No. 29), is **DENIED AS MOOT**; and

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<sup>1</sup> The Court notes that in order for the Court to construe any subsequently-filed motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction as a factual attack on Plaintiff’s complaint, the moving defendant must first controvert the factual allegations of the complaint through an answer to the complaint or by otherwise contesting the factual allegations of the complaint, such as attaching a signed declaration of facts to its motion.

3. The Federal Defendants shall file an answer or otherwise respond to Plaintiff's complaint within 30 days of the date of this Order.

s/ Yvette Kane

Yvette Kane, District Judge  
United States District Court  
Middle District of Pennsylvania